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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-223

CENTRAL HARDWARE COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD and RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF ON BEHALF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

LAWRENCE M. COHEN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607
Attorneys for the American Retail Federation

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 I Street, N.W.
Washington, D. C. 20006
Of Counsel

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereinafter referred to as the "Federation") is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small

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* Pursuant to Rule 42(2) of the Rules of this Court, the written consents of all parties hereto have been obtained and will be lodged with the Clerk of the Court.

local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The ramifications of the rule promulgated by the court below—that a retail establishment, however situated, is compelled in every instance to allow union organizers unrestricted access to its private parking lots—are substantial:

1. Under the erroneous view of the Eighth Circuit, it is now irrelevant whether, as in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), a union is engaged in First Amendment activities directed toward informing the public of the existence of certain facts or, as here, engaged in organizational activities that are purely statutory in origin. In the latter case, as well as the former, the court held that there is no longer any necessity that, in order to appropriate private property, non-employee organizers be first required to expend "reasonable efforts" to publicize their message "through other available channels of communication." *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

2. Moreover, even assuming that the organizational activities here involved are considered constitutionally protected, the court below has seriously misconstrued *Logan Valley*. That case, it is submitted, did not necessitate that *all* retailers, regardless of the nature of their operation, who seek to increase sales by providing parking space to customers, are thereby concomitantly obligated to furnish such facilities for the competing use of strangers. All that *Logan Valley* required was that, when no reasonably effective alternative channels of communication are available, then, and only then, may

private property be confiscated for the use of those who wish to engage in First Amendment activities thereon.

The decision in the instant case will, accordingly, have far-reaching consequences to the membership of the Federation. For this reason the Federation desires to present its views to this Court.

ARGUMENT

I. The Use Sought By The Union Here Distinguishes This Case From Logan Valley.

As Judge Gibson observes in his dissent (App. pp. 87-8), there is a crucial distinction that must be drawn between peaceful picketing protected by the First Amendment, as in *Logan Valley*, and organizational activities, such as those involved in this case, whose genesis is the National Labor Relations Act. Where, as here, statutory and not constitutional rights are involved, the controlling standards are those of *Babcock & Wilcox* and *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945), not *Logan Valley*.

The principal interest of the First Amendment is in the "dissemination of information". *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). The speech aspects of picketing, directed toward informing the public of the existence of certain facts, are, as a result, clearly constitutionally protected. Picketing, after all, is "traditionally . . . a major weapon to implement the goals of a strike and . . . characteristically . . . aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt." *United Steelworkers of America* v. *National Labor Relations Board*, 376 U.S. 492, 499 (1964).

The instant case, however, concerns a totally different arena where the interests at issue are of a totally dif-

ferent order. The Union's organizational message, in this case, as Judge Gibson observed, was "directed solely to the company employees and is imposed by confrontation and argument (to which some employees objected)." App. p. 88. The Union was, in a very real sense, engaged in selling its services to the Central employees—a purpose closely akin to that of purely commercial conduct which, while perhaps within the ambit of the First Amendment, does not warrant the deprivation of important property rights. See, e.g., *Breard* v. *Alexandria*, 341 U.S. 622, 641-5 (1945). It is, therefore, not surprising that both *Babcock & Wilcox* and *Republic Aviation*, the principal decisions of this Court setting forth the accommodation necessary between organizational rights and property rights, are couched in terms of statutory rather than constitutional principles. As Mr. Justice Reed, the author of *Republic Aviation*, states in his dissenting opinion in *Marsh* v. *Alabama*, 326 U.S. 501, 515 (1946), without disagreement from the majority in that case:

> . . . Heretofore this Court has sustained the right of employees, under an appropriate statute, protecting full freedom of employee organization, to solicit union membership in nonworking time on the property of an employer and against his express prohibition. This is because the prohibition is an impediment to the right of organization which is protected by a statute which governs a relation between employers and employees if and when the latter are admitted to the employers' premises as licensees. *It was recognized in the opinion that the freedom of solicitation was the result of a regulatory statute and was not a Constitutional right.* Republic Aviation Corp. v. National Labor Relations Bd. 324 U.S. 703 (emphasis added).

This critical distinction between the Union's desired use in this case and that involved in *Logan Valley* is vividly illustrated by the considerations that existed for granting the union pickets access to the Logan Valley

Plaza. Thus, in its brief (pp. 11-12) in *Logan Valley*, the Retail Clerks Union, one of the respondents here, argued that, by being forced to employ other channels of communication in that case, unions would be materially disadvantaged: (1) they "would be removed in time and in distance from the premises of the employer with whom they have a dispute, and as a consequence their message would be diluted"; (2) they "would run the risk of injuring innocent, secondary employers . . . [and] subject themselves to secondary boycott charges before the National Labor Relations Board [and] . . . private suits for secondary boycott damages in acts brought under . . . 29 U.S.C. § 303"; and (3) they "would subject themselves to the risk of harm from traffic if they were required to picket on busy, modern, suburban highways."

Significantly, *none* of these considerations exist in this case. Requiring the union organizers here to utilize personal contact at employee residences, union meetings or, as Judge Gibson notes, other "conventional means of communication" (App. p. 89) would not "truly diminish the ability of the [union] . . . to carry [its] message to the employees". *N.L.R.B.* v. *United Steelworkers of America*, 357 U.S. 357, 363 (1968).[1] Similarly, precluding

[1] See, e.g., the various means of expression described at footnote 1 of *Babcock & Wilcox*. Moreover, the Retail Clerks have in the past not only limited themselves to such traditional avenues of communication; they have, as a pre-*Logan Valley* study by the Federation of the 1967 editions of the Union's magazine, *The Retail Clerks Advocate*, amply demonstrates, employed a host of additional devices: a national consumer boycott involving "hundreds of picket demonstrations, tens of millions of leaflets, balloons and bumper stickers . . . to tell the story" (June, 1967, p. 3); announcements on a national television network "to advise customers of the benefits of shopping where they see the the RCIA store card" (July, 1967, p. 18); state and county fairs, holiday celebrations and other summer festivals to provide "the opportunity to publicize the RCIA and the union store card" (October, 1967, p. 12); extensive distribution of RCIA shopping bags (June, 1967, p. 5 and October, 1967, p. 12); outdoor billboards in "strategic locations" (July, 1967, p. 14); sponsorship of local radio or television programs

organizational activities on Central's parking lots would not raise the spectre of improper secondary boycott conduct; this case does not involve picketing or related activities and, moreover, there is no possibility of embroiling other employers. And finally, denying the Union the right to invade Central's private property does not, as in *Logan Valley*, necessitate that it communicate only at ineffective and hazardous distant berms. There are, as described in footnote 1, countless other means of communication available which would have full insured the effective communication of the Union's message.

II. The Situs of the Present Dispute Distinguishes This Case From Logan Valley.

It is the availability here of effective alternative channels of communication which is also at the core of the Eighth Circuit's misconception of *Logan Valley*. Both that case and *Marsh* permitted private property to be appropriated for First Amendment purposes in only one carefully circumscribed instance: *where no reasonably effective alternative means of communication were available.* If such alternatives were available as, for example, in *Taggart* v. *Weinacker's*, 397 U.S. 233 (1970),[2] no

(October, 1967, p. 12, and April, 1967, p. 16); sponsorship of local sports teams (October, 1967, pp. 12, 27); floats entered in holiday parades (November, 1967, pp. 12, 26); Union Label Week in New York City (October, 1967, p. 28); union-industry show exhibits (July, 1967, p. 14); a "mile-long caravan" of automobiles to protest the Sunday selling of cars (January, 1967, p. 28); and even skywriting, "a new idea in publicizing the 'shop union' theme" (November, 1967, p. 26).

[2] *Taggart* involved a single retail store containing a supermarket and a small drug department, all owned and operated by the same company. For the convenience of shoppers, the owner provided a small adjacent parking lot able to accommodate only two rows of automobiles. Adjoining the parking lot were public sidewalks. This store became involved in a labor dispute, resulting in picketing by a union on the parking lot and the private walkway leading from the lot to the store. The union did not picket on the public sidewalks, although, given the nature of the premises, the pickets would have

access to private property was sanctioned. Assuming, therefore, that the Union's proposed use in this case is found to be not only statutory but constitutionally protected, *Logan Valley* is nevertheless inapplicable.

In *Logan Valley*, the Union's publicity picketing, directed to prospective customers of a specific store, could not reasonably have been conducted at any other situs. The Weis store was the point of persuasion, the target of the "on-the-spot" public criticism. A prohibition of picketing at that location would, therefore, have "substantially hinder[ed] the communication of the ideas which [the union] seeks to express"; a "*cordon sanitaire* of parking lots" would have been created. 391 U.S. at 324-5. As in *Marsh*, where the company town had taken on all the attributes of *any* town and was in effect "dedicated to public use" (*Breard* v. *Alexandria*, 341 U.S. 641, 643 (1950)), free expression would have been defeated altogether if the use sought had not been permitted.

In the present case, however, there are reasonably effective alternative means of communication available. Whether the Central parking lots have or do not have a "quasi-public" status (App. p. 64) is, therefore, immaterial. Mere "openness to the public" is not a magical touchstone that converts private property into public thoroughfares. Such a criterion would provide non-employee union organizers with a license, absent actual interference, to solicit and distribute literature on a retail store's sales areas.[3] It would also negate decisions such

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also been readily visible there and would have had equal access to the store's customers. The union sought to obtain review here of its state court trespass conviction, alleging its constitutional right to engage in First Amendment activity on the premises of the "*shopping center*". This Court granted the petition for writ of certiorari, but subsequently declined to reach the merits, concluding that the writ had been improvidently granted. The Court did *not*, however, vacate the lower court's decision.

[3] The Board has apparently reserved this question in the present case. App., p. 68 and n. 3. Cf., however, the *amicus* memorandum of

as *N.L.R.B.* v. *Kutscher's Hotel and Club*, 427 F. 2d 200, 201 (2nd Cir. 1971), in which a large hotel, consisting of "300 rooms and containing the dining rooms, recreation rooms, bar, night clubs and shops," was held to be off-limits to stranger organizers who had not exercised other available channels of communication.[4] The fact that any retail establishment necessarily invites the patronage of the public obviously cannot, *ipso facto*, constitute a dedi-

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the NLRB in *Logan Valley* (p. 17) in which the Board concedes that, where a union seeks entry to actual sales areas, "the interest of the State in providing a [trespass] remedy for that conduct is so great . . . that the State would not be barred from acting", and *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375, 380 (7th Cir. 1952), where the court noted that the Board has approved the prohibition of union solicitation and discussion on the selling floors and *related traffic facilities* of department stores even when the employees are off duty". (Emphasis added). But see, however, *Priced-Less Discount Foods, Inc.*, 162 NLRB 872 (1967) at n. 1, the principal prior Board authority (App., p. 69), which implies that the *Babcock & Wilcox* rule is now to be limited to situations where the premises involved were "never open to the public", and *Scott Hudgens*, 192 NLRB No. 111 (1971), *pet. rev. docketed*, No. 71-3906, 5th Cir., Oct. 21, 1971, where the Board found that, even if a shopping center sanctions picketing on its parking areas and mall perimeter sidewalks, the center must nevertheless still make available for such purposes the interior common aisleways of its enclosed mall.

[4] See, e.g., *N.L.R.B.* v. *Tamiment, Inc.*, 451 F. 2d 794 (3rd Cir. 1971) (where, by reason of a union's failure to show that it had made reasonable efforts to utilize alternative channels of communication, non-employee union organizers were denied access to a largely self-contained, 2200 acre resort); *N.L.R.B.* v. *Solo Cup Company*, 422 F. 2d 1149 (7th Cir. 1970) (where, by virtue of a similar availability of alternative forums, non-employees were precluded from engaging in organizational activities on the private road of a plant located in an industrial park); *Monogram Models, Inc.*, 192 NLRB No. 99 (1971) (where, because the employees involved were not otherwise beyond the union's reach, non-employee organizers were not permitted to invade the private premises of a plant located along a four lane, 40 m.p.h. speed limit, highway in a Chicago suburb); and *The Falk Corp.*, 192 NLRB No. 100 (1971) (where, in similar circumstances, a union was also denied access notwithstanding that it vainly attempted to handbill, hold meetings with and otherwise communicate with the employees it was seeking to organize).

cation of such premises for competing uses. The phrase "quasi-public" is, at most, a fictional assumption which cannot be elevated to the status of a rule of law.

Similarly, if the single store involved in this case is regarded as "the community business block" or the analogue of the "traditional town square" or "town center", those terms become meaningless. The large regional shopping center of *Logan Valley* can perhaps be so equated; the single, free-standing [illegible] here at issue clearly cannot. The latter es[illegible]nts vary considerably in location, size, function an[illegible]nner of construction. Since sales are closely depe[illegible]t upon available parking space,[5] parking facilities ma[illegible]e provided on several tiers of a store or on an adjacent lot of varying size. The enormous variety of such operations is such that a single rule relating to all retail establishments, without further qualification or distinction, is patently an inappropriate basis for adjudicating individual disputes. Yet, by blindly treating huge suburban complexes and single urban stores alike, the court below has reached precisely such a result.

The "mandate of *Logan Valley*" (App., p. 84) surely requires no such uniform criterion. It was only the sprawling nature of the large suburban shopping center in that case, with its large perimeter, roadways and other "functional equivalents of the streets and sidewalks of a normal business district", that led the Court to note the "striking" similarity to the company town of *Marsh* v. *Alabama*, 326 U. S. 501 (1945). 391 U.S. at 317. A smaller shopping center or, as in this case, a single urban retail store is functionally and authoritatively a far dif-

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[5] See, e.g., Aronov, *Chain Store Age*, Sp. Ed. E. 41, May 1967 and Brief for the International Council of Shopping Centers, Inc. as *amicus curiae* in *Homart Development Co.* v. *Diamond*, No. 1469, O.T. 1970, pp. 3-4, discussing, in view of the dependency of sales upon available parking space and the considerable expense of land for parking, the optimum ratio of parking spaces to gross leaseable area that should prevail.

ferent entity.[6] There is, for example, a significant difference in the social role, and the power and influence of the owner over the lives and thoughts of his customers, in each type of establishment. Particularly in a small town otherwise lacking a "town square," a vast regional shopping center may contain such diverse attractions as ice skating rinks, restaurants, professional offices, reference libraries, night clubs, chapels and other indicia of the traditional "downtown" area.[7] The single store in this case, or the "shopping center" of *Taggart*, are obviously of an entirely different magnitude.

The public frequents a retail establishment because of the substantial investment that has been made to gain and retain its patronage. The patrons have been led to believe, through the expenditure of considerable money and effort, that the establishment is a comfortable and convenient place to do business. They have a limited amount of shopping time available. If, upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses, there will clearly be a serious adverse effect on the store's normal sales activities. Such a substantial deprivation of property rights is necessary where, as in *Logan Valley*, it is the only means of providing for the effective exercise of First Amendment

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[6] See, e.g., Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1967, at pp. 27-9, pointing out that, as of 1965, approximately 57% of "shopping center" business results from centers with a gross leaseable area of *less than* 200,000 square feet. Moreover, the vast percentage of additional retail business is accounted for by discount stores ("essentially a shopping center itself under one roof," *id* at 31), solo "highway retailers" providing "easy access for automobile traffic and plenty of parking space" (*ibid.*) and single urban stores such as involved in this case.

[7] See, e.g., King, *Supermarkets Hub of Suburbs*, subtitled "Big Shopping Areas Taking on the Role of 'Downtown'", in N. Y. Times, Feb. 7, 1971, § 1 at p. 58, col. 4-6; and Weiss, *Shopping Center Malls; The Next Place for Teen-Age Riots*, Advertising Age, April 14, 1969, p. 106.

rights. In the present case, however, for the reasons previously discussed, there is no such compelling justification.

CONCLUSION

For the above-stated reasons, as well as those set forth by Petitioners, the decision of the court below, insofar as it invalidates the Company's non-employee, no-solicitation rule, should be reversed.

Respectfully submitted,

LAWRENCE M. COHEN
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607
Attorneys for the American Retail Federation

ALAN RAYWID
COLE, ZYLSTRA & RAYWID
2011 I Street, N.W.
Washington, D. C. 20006
Of Counsel